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IMPROVING THE FEDERAL JUDICIARY.

Our readers are sometimes puzzled to know our position on the subject of the concentration of the powers of government at Washington. We have been complimented and condemned because we favored a strict construction of federal powers, or, on the other hand, because we favored a wider extension of federal jurisdiction.

As a matter of fact we have tried to keep an open mind on this question, preferring to consider each so-called act of "federal usurpation" on its merits. There is always danger in labeling oneself a "federalist" or a "states rights" man. The law is not logic and rules of law cannot be drawn from such generalizations with the same confidence that the scientist announces his corollaries. The human equation in government must be kept constantly in mind and the vagaries of human nature will not infrequently require an unexpected change in the anticipated continuity of the working out of some preconceived plan of government.

The great world war was one of those unexpected events that tested our federal form of government to the utmost and we are all proud of the way in which the old ship of state stood the test. For the purpose of waging this war, the powers given to the president were as great as ever exercised by any absolute monarch in this or any other age. The ease and promptness with which our Constitution permitted the federal government to adjust itself to the new and difficult conditions which confronted us in the war with the world's greatest autocracy should satisfy the most extreme federalist that, when occasion demands, the Constitution is sufficient to confer all the powers needed by the federal government; on the other hand, the immediate outflow of the tide of extraordinary war powers bestowed upon the federal government which began at the moment the armistice was signed with the gradual resumption of state authority, effected without friction or confusion, should satisfy the most extreme partisan of state sovereignty that there is no real danger, under our form of government, of federal usurpation.

As a matter of fact, there is a certain equilibrium between the powers of the states and the powers of the federal government, which, while readily adjustable to meet extraordinary conditions arising on either side, tends to prevent either from encroaching upon the other. There is, therefore, no occasion for being a propagandist in favor of either state or federal jurisdiction but rather for being jealous that both be equally respected.

What often appears to be usurpation on the part of the federal courts is nothing more than a new application of old powers, expressly or impliedly granted by the Constitution, to meet new conditions, sometimes in an effort on the part of the federal courts to reach out into that so-called "twilight zone," and control the lawless machinations of men who seek to take advantage of the division of authority under our form of government.

At this time time, therefore, we take occasion to congratulate the federal courts on their wise construction of war legislation. We are sure that the bar of the country appreciates the courage of the federal judges in resisting public opinion which on several occasions was apparently demanding the supreme assertion of federal jurisdiction over persons and property in absolute disregard of state authority or constitutional inhibitions.

The fact that the business of the federal court has increased and that its jurisdiction has been widened by the exercise of federal authority over interstate commerce and other fields of federal supervision under the Constitution does not indicate any encroachment of federal power but rather the proper exercise of a jurisdiction long neg-

lected. This fact, we believe, will even more clearly appear when the federal courts come to administer and construe the reconstruction statutes that must be passed by Congress to take care of our army of unemployed soldiers, to unscramble the railroads and telegraph lines and to supplant radical war measures by legislation that will make less difficult and burdensome the effort of business to readjust itself to after-the-war conditions.

For all these reasons, and possibly others that may occur to the thoughtful reader, this, we believe, is the time for all good lawyers to come to the aid of the federal courts. Over these tribunals which now more directly than ever before come into contact with the business and social life of the people, should preside lawyers of large vision and thorough legal experience and scholarship.

Possibly there are two measures of immediate importance that affect the federal courts that should be pressed vigorously at this time. First, the salaries of all federal judges should be raised to amounts commensurate with the ability demanded of judges of these courts. Second, provision should be made for the permissible retirement on full pay of judges wh have attained the age of 70 years, and som means discovered by which men hitherto capable as judges but incapacitated by physical ailments should be given the alternative of taking advantage of the age of retirement or of being superseded by the act of the president, whenever the President is of the opinion that any particular judge who has reached the natural age limit of human life is physically unable longer to discharge the duties of his office.

Of course there are certain objections to any mode of compulsory retirement of federal judges; nor would any such action be necessary if all federal judges would recognize the encroaching limitations of age and at such times consult occasionally and candidly with the President and with members of the bar as to their ability effectually to discharge any longer the duties of their office. Of course, it would be unwise to fix upon the the age of 70 as a date at which every judge should retire irrespective of his physical condition, but authority should be conferred on some one, preferably the President of the United States, to suggest to federal judges who have reached the age of 70 and are physically unfit, that it would be for the best interests of all concerned that they should take advantage of the liberal provisions made by Congress for their retirement with all the honors of their life's work upon them undimmed by the pitiable follies and failures often made by judges in the attempt to ignore or overcome the limitations of age.

These measures should be passed at the present session of Congress. Bills representing both ideas are before Congress. The bill to increase the salaries of District Judges to $7500.00 and of Circuit Judges to $8500.00 has already passed the House and is now before the Senate. The other bill (H. B. 12001) is still pending in the House. We urge lawyers to ask the Senators to pass the salary increase bill without delay, and that they give the members of the House the benefit of their best thoughts with regard to the subject of the retirement of federal judges.

NOTES OF IMPORTANT DECISIONS.

RESPONSIBILITY OF SHERIFF FOR DESTRUCTION OF PROPERTY OF THIRD PERSON WRONGFULLY LEVIED UPON.—If a sheriff levy on property of a stranger and while property is still in owner's possession, though under the dominion of the sheriff, the property is accidentally destroyed by fire, is the sheriff liable? The Supreme Court of Oregon holds that the sheriff is liable. Sabin v. Chrisman, 175 Pac. 622. It gives the following reasons:

"An officer making a levy of an execution may at his own risk deliver property levied upon to a bailee and take a receipt thereof. The

goods are regarded as still in the officer's control (4 Cyc. 661-663; 2 Freeman on Executions, sec. 262; Palmer-Haworth Logging Co. v. Henderson, 174 Pac. 531). Where an officer levies a writ of execution on the property of a stranger, the plaintiff in the writ is liable to the owner and person having the right of possession thereof when he directed the wrongful levy; and such owner has a right of action at once, either for the reclamation of the property or to recover damages, it not being material that the property was sold or destroyed subsequently to the wrongful levy."

It is interesting to note that in a similar case the Ohio Supreme Court reached a different result. In Sammis v. Sly, 54 Oh. St. 511, the property was attached by the sheriff and left in plaintiff's possession. Plaintiff was not the party named in the writ. The property was subsequently destroyed by fire. The court held the sheriff not liable.

We believe that some courts go too far when they declare that a wrongful or mistaken levy by a sheriff amounts to a conversion of the property. The rule is that such a levy is a trespass and that the sheriff is liable for damages *caused by the trespass*, but to argue, as does the court in the principal case, that this is, in fact, a technical conversion of the goods so as to make the sheriff liable as an insurer, even though he leaves the goods in the possession of the rightful owner, is going much further than the logic or the policy of the law require.

RIGHT OF CONGRESS TO REGULATE CONTRACTS OF SEAMEN MADE IN FOREIGN COUNTRIES.—It is surprising that the Supreme Court should divide five to four on such an apparently simple question as the right of Congress to regulate and make void contracts between foreigners in foreign countries. If abstractly such power may be said to exist its exercise would be futile on the one hand, or absurdly harsh and unjust on the other. Congress should not be presumed to have intended any such result.

Such was the decision of the majority of the court in construing the Seamen's Act in Sandberg v. McDonald, not yet reported. The action was brought by foreign seamen of the British ship, "Talus," to recover for one-half of the wages due them. The defendants set up that in England before the voyage, plaintiffs were paid certain advances, which, together with further sums paid to them amounted, in fact, to more than one-half the wages due plaintiffs. It is contended, however, that under the Seamen's Act, these advances were illegal and cannot be properly deducted from the amount due. Seamen's Act (36 Stat. 1165, 7 U. S. Comp. Stat. 1916, Sec. 8323). This act passed in its present form in 1915 provides *inter alia:*

"It is hereby made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wage or allotment shall in no case, except as herein provided, absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defence to a libel suit or action for the recovery of such wages. That this section shall apply as well to foreign vessels while in the waters of the United States as to vessels of the United States, and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation."

The court held the present action could not succeed on the ground that Congress did not intend to make invalid contracts between foreign subjects made in a foreign country whose law sanctioned the contract. "Legislation," says Justice Day, "is presumptively territorial and confined to limits over which the law-making power has jurisdiction." And he argues that whether abstractly it could be said that Congress had the power or not to regulate contracts made in foreign countries between foreign subjects, the exercise of such power was not to be presumed from the terms of the Act quoted. Moreover, the fact that the owner of the vessel is made criminally liable for a violation of the Act is further proof to the court that Congress intended to deal with matters in their own jurisdiction. "Congress," says Justice Day, "certainly did not intend to punish criminally acts done within a foreign jurisdiction, a purpose so wholly futile is not to be attributed to Congress."

It was argued on behalf of plaintiffs, and the argument was accepted as sound by Justices McKenna, Holmes, Brandeis and Clarke, that it was not the nationality of the seamen or of the boat, but the fact that the boat was at the time in the territorial waters of the United States that was the test of the application of the law. "We cannot doubt," said Justice McKenna, who wrote the dissenting opinion, "the power of Congress to impose conditions upon

foreign vessels entering or remaining in the harbors of the United States." But this is not the question: The question is, shall Congress be presumed to have undertaken to impose American conceptions of justice upon the whole world? Shall Congress be presumed to have intended to abrogate the rule recognized throughout the civilized world that a contract valid where made shall be regarded as valid everywhere?

Justice McKenna, it seems to us, makes the mistake of basing the application of the Act in the principal case on the ground that the ship on which the plaintiff sailed happened to come within the territorial waters of the United States rather than on the contract of employment and the proper law which was to govern its validity. When two persons make a contract its validity is necessarily determined by the place where they enter into their obligation. It would be ridiculously unjust to say that they must see that their contract complies with the law of every state and nation in the world on pain of giving either of the parties a place of refuge, so to speak, in the boundaries of that jurisdiction whose law does not recognize the validity of such contract. If that is true, how much more unjust would it be to impose criminal and civil penalties upon those whose only offense is that they entered into a contract prohibited by the law of the United States, but valid by the law of the state where the contract is made and of which the contracting parties are citizens?

DOES A CHATTEL MORTGAGE OF ENTIRE STOCK OF GOODS VIOLATE THE BULK SALES LAW?—It is possible to evade the bulk sales law by a bulk mortgage. All the recent cases have sustained this rule and the latest case goes further and declares that even where the conveyance is in form a sale, it will be construed as a mortgage if there is an indebtedness which the vendor intends to secure. Farrow v. Farrow, 206 S. W. Rep. 135.

The general rule is that where there is a doubt whether a conveyance is a sale or a mortgage of certain chattels named, courts are inclined strongly to resolve the doubt in favor of a mortgage. Mr. Schouler, in his recent work on Personal Property (1918), p. 623, says:

"Often a bill of sale or transfer absolute on its face has been shown to be intended only for a pledge on mortgages by some other writings or even by mere conduct of the parties and parol evidence."

Another element of importance in this problem is the gradual weakening of the old common law rule that want of delivery of the goods mortgaged to the mortgagee is a badge of fraud. The rule today is that where the mortgagor's possession is expressly provided for by contract this is sufficient to overcome any presumption of fraud that might arise.

And not only may the goods mortgaged be left in the possession of the mortgagor, but the modern tendency in equity, at least, is to depart from the strict rule of requiring property mortgaged to be in existence, specifically described and permits the mortgagor to include after-acquired property not in existence, either potentially or otherwise, at the date of the mortgage. In Schouler on Personal Property (5 Ed., 1918), p. 631, the author says:

"The main difficulty results from the circumstance that equity asserts a rule more favorable to the mortgagee out of regard to the true intent of the transaction. While in equity the mortgage of future-acquired chattels does not pass the title completely, it nevertheless creates in the mortgagee an equitable interest; and this equitable interest is upheld as against judgment creditors and others, upon the theory that the mortgage, though inoperative as an instrument, operates to transfer the beneficial interest to the mortgagee as soon as the property is acquired."

These observations will justify the concern of those who have expected to rely on the Bulk Sales Law to defeat fraud upon creditors from a transfer of goods, wares and merchandise in bulk. If a storekeeper can mortgage his entire stock of goods, including future acquired property, all of which is retained in his possession with only the weakest possible presumption of fraud, if any at all, arising out of the transaction, the creditors can be as easily defeated in securing proper protection for their claims by a bulk mortgage as by a bulk sale.

The courts have construed the Bulk Sales Law as not including chattel mortgages. In Hannah & Hogg v. Richter Brewing Co. et al. (149 Mich. 220, 112 N. W. 713), the Supreme Court of Michigan held that a chattel mortgage is not within the meaning of a statute forbidding the sale, transfer or assignment of a stock of goods in bulk without certain preliminary proceedings. To the same effect see McAvoy v. Jennings (44 Wash. 79, 87 Pac. 53; Noble v. Ft. Smith Retail Grocery Co. (34 Okla. 662, 127 Pac. 14). In Wasserman v. McDonnell (190 Mass. 326, 76 N. E. 959), it appeared that the owner of a stock of dry goods executed and

delivered a chattel mortgage thereon, which was duly recorded. There was a clause in the mortgage giving the mortgagor the right to remain in possession of the goods and to sell his stock in trade in the usual course of business. The mortgage also applied to all future stock that might be acquired in the business. There was a breach of the conditions of the mortgage, and the mortgagee took possession of the mortgaged property for the purpose of foreclosing it. The court denied the contention of creditors that this transaction was prohibited by the Bulk Sales Law.

CONSTRUCTION OF PHRASE OF CONSTITUTION, "TWO-THIRDS OF HOUSE."

The question has been repeatedly raised as to what constitutes "two-thirds of that House" in passing a bill over the President's veto and what constitutes "two-thirds of both Houses" in submitting amendments to the Federal Constitution. The same principle applies to both in determining whether it takes two-thirds of all of the members elected or two-thirds only of a quorum present and voting. Both precedent and reason are authority for claiming that it requires only two-thirds of a quorum present and voting to pass a bill over the President's veto.

John Randolph Tucker, in his work on the Constitution of the United States, Volume 1, at page 427, says:

"A majority of the body constitutes a quorum, but what is a majority of the body? The Constitution declares that the House shall be composed of members chosen by the people of the several states, and the Senate of two senators from each state, chosen by the legislature thereof. Does the majority, to constitute a quorum, mean a majority of all the representatives which the several states may be authorized to elect, or of all who have actually been elected? And as to all of those who have actually been elected, there may be some who have died or resigned or been expelled. Shall these be counted? The House of Representatives have by a series of decisions (as well as the Senate) settled that the House is composed of members who have been chosen as representatives, and the Senate and Senators, who may therefore be present if they choose; all of these are to be counted as constituting the body, and a majority of these constitute a quorum."

The United States Supreme Court, in the case of United States v. Ballin,[1] decided:

"The Constitution provides that 'a majority of each (House) shall constitute a quorum to do business.' Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the House arises."

In all of the adjudicated cases whenever the word House or Senate or Legislature is referred to, it means the legislative body authorized and capable of performing legal acts. When the Constitution refers to "that House," it means the House or Senate as a legislative agency. The Constitution, itself, provides that a majority of the House and Senate shall constitute a quorum to do business. When a requirement is made that two-thirds of "that House" shall agree to the passage of a bill over the President's veto, it can mean but one thing, namely: two-thirds of the House as recognized by the Constitution to transact business. In other words, a quorum possesses all of the powers of a whole body.

IN THE ABSENCE OF A SPECIFIC REQUIREMENT THAT THE REQUIRED MAJORITY BE, OF ALL THE MEMBERS ELECTED, THE RULE IS THAT IT REQUIRES ONLY A MAJORITY OF A QUORUM.

There is no requirement in the Federal Constitution that it shall take two-thirds of all members elected. It only requires two-

(1) 144 U. S., 1.

thirds of each House, a quorum being present.

Cooley, in his Treaties of the Constitutional Limitations, says:

"A simple majority of a quorum is sufficient unless the Constitution establishes some other rule."

"For the vote required in the passage of any particular law the reader is referred to the Constitution of his state. A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended."

The Supreme Court of the United States,[2] said:

"In those states where the Constitution provides that a majority of all the members elected to either House it shall be necessary for the passage of any bill to have a majority of all elected, but the court specifically stated 'no such limitation is found in the Federal Constitution and therefore the general law of such bodies obtains.'"

The Supreme Court of Alabama,[3] says, with reference to a bill which required a vote of two-thirds of each House:

"The requirement was complied with by favorable vote on the Act, of two-thirds of a quorum of each House."

In State v. McBride,[4] the Supreme Court of that state, with identically the present question before it, held:

"An amendment which is ratified by two-thirds of a quorum; that is, two-thirds of a majority of all elected, is ratified by two-thirds of that House, within the meaning of the Constitution."

In Southworth v. R. R.,[5] the Supreme Court of Michigan, in a case involving the construction of a constitutional provision requiring the "assent of at least two-thirds of each House" to pass an act of incorporation, held:

"The word 'House' in Section 2, Article XII of the Constitution of 1835, means the members present doing business, there being a quorum, and not a majority of all the members elected; and an act of incorporation passed by two-thirds of the members present, there being a quorum, is constitutional."

In Smith v. Jennings,[6] the court held:

Article IV, Section 23, providing that 'two-thirds of that House' shall be required to pass a bill or joint resolution that has been unapproved or unsigned by the Governor, the expression means two-thirds of the members present in a lawfully constituted session, and not two-thirds of the total membership.

Continuing the court said:

"A quorum * * * possesses the power of the whole body in all matters of business wherein the action of a larger proportion of the entire membership is not clearly and expressly required. So, ordinarily, when a quorum is present acting, the 'House' is present acting, in all its potentiality. When the Constitution speaks of 'two-thirds of that House' as the vote required * * * it means two-thirds of the House as then legally constituted and acting upon the matter."

In deciding the case in 144 U. S., page 1, the Supreme Court quoted with approval,[7] the following:

"According to the principle of all the cases referred to a quorum possesses all the power of a whole body."

A long list of legislative precedents might be cited that two-thirds of a quorum is all that is necessary to pass a bill over the President's veto. Many of these measures were enacted during the reconstruction period when partisan feeling was bitter and if there was any good reason for raising

(2) 144 United States 1.
(3) Warehouse v. McIntosh (1), Ala. App., 407.
(4) 4 Mo., 303.
(5) 2 Mich., 287.
(6) 67 S. C., 324.
(7) State v. Deliessline, 1 McCord, L., page 52.

the question it would have been pressed with vigor at that time.

Curtis on History of the Constitution,[8] says:

"A question has been made whether it is competent for two-thirds of the members present in each House to pass a bill notwithstanding the President's objections or whether the Constitution means that it shall be passed by two-thirds of all the members of each branch of the Legislature. The history of the veto in the convention seems to settle the question. There was a change of phraseology in the course of the proceedings on this subject which indicates very clearly a change of intention. The language employed on the resolutions in all the stages through which they passed was 'The National Executive shall have a right to negative any legislative act which shall not be afterwards passed by two-third parts of each branch of the National Legislature.' This was the form of expression contained in the resolutions sent to the Committee of Detail and if it had been incorporated into the Constitution, there could have been no question but that its meaning would have been that the bill must be afterwards passed by two-thirds of all the members to which each branch is constitutionally entitled. But the Committee of Detail changed the expression and employed one which has a technical meaning, that meaning being made technical by the Constitution itself. Before the committee came to carry out the resolution relating to the President's negative, they had occasion to define what should constitute a 'House' on each branch of the Legislature, and they did so by the provision that a majority of each House shall constitute a quorum to do business. This expression 'a House or each House' is several times employed in the Constitution with reference to the facilities and powers of the two chambers respectively and it always means, when so used, the constitutional quorum assembled for the transaction of business. The same expression was employed by the committee when they provided for the mode in which a bill once rejected by the President should be again brought before the legislative bodies. They directed it to be returned 'to that House in which it shall have originated,' that is to say, to a constitutional quorum, a majority of which passed it in the first instance, and they then provided, that if, 'two-thirds of the House shall agree to pass a bill, it shall be sent together with the objections, to the other House * * * if approved by two-thirds of that House, it shall become a law.' This change of phraseology taken in connection with the obvious meaning of the term 'House,' as used in the Constitution when it speaks of a chamber competent to do business, shows the intention very clearly. It is a very different provision from what would have existed, if the phrase two-third parts of each branch of the National Legislature had been retained." (See Elliot, V. 349, 376, 378, 431, 536.)

"This view will be sustained by an examination of all the instances in which the votes of 'two-thirds' in either body are required. Thus, 'each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." (Art. I, Sec. 5.)

"The context of the same article defines what is to constitute a 'House,' and makes it clear that two-thirds of a 'House' may expel. That this was the intention is also clear from what took place in the convention. Mr. Madison objected to the provision as it stood on the report of the committee, by which a mere majority of a quorum was empowered to expel, and, on his motion, the words, 'with the concurrence of two-thirds' were inserted. (Elliot, V. 406, 407.) In like manner the 5th Article of the Constitution empowers Congress 'whenever two-thirds of both Houses shall deem it necessary' to propose amendments to the Constitution. The term 'House' is here used as synonymous with a quorum. * * *

"But it is to be remembered, that the Constitution makes a general provision as to what shall constitute a House for the transaction of business; that when it means that a particular function shall not be performed by such a house, or quorum, it establishes the exception by a particular provision, as when it requires two-thirds of all the states to be present in the House of Representatives on the choice of a President, and makes a majority of all the states necessary to a choice; and that whether the function of the Senate in approving treaties is or is not a part of the business which under the general provision is required to be done

(8) Volume 2, page 267 (note).

in a 'House' or quorum consisting of a majority of all the members; the Constitution does not speak of this function as being done by a 'House' but it speaks of the advice and consent of the Senate 'to be given' by two-thirds of the senators present. The use of the term 'present' was necessary, therefore, in this connection because no term had preceded it which would guide the construction to the conclusion intended; but in the other cases, the previous use of the term 'House,' defined to be a majority of all the members, determines the sense in which the term 'two-thirds' is to be understood and makes it, as I humbly conceive, two-thirds of a constitutional quorum."*

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*This article was prepared several weeks before the Supreme Court handed down its recent decision involving the Webb-Kenyon Act (Missouri-Pacific Ry. Co., Plaintiff in Error v. State of Kansas.) In this decision, rendered January 7, 1919, Chief Justice White said:

"The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-third vote necessary to override a veto, makes the practice as to the one applicable to the other.

"At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each House organized as a legislative body pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. * * *

"The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the states and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed and we need not stop to refer to the precedents demonstrating its accuracy. * * *

"In consequence of the identity in principle between the rule applicable to amendmnts to the Constitution and that controlling in passing a bill over a veto, the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before, but came from conviction expressed, after deliberation, as to its correctness by many illustrious men."

THE NECESSITY FOR A MARINE COURT.

A majority of the American people are employed in occupations of a non-maritime character. The necessity for a marine court is, therefore, not obvious to them, but apparent only to persons who are engaged in nautical affairs. Nearly everybody at some time is affected by water transportation, as a passenger or in the shipping of merchandise; consequently, the competency of mariners, the regulation of water travel and other matters pertaining to our merchant marine are really of general concern.

Before the appearance of Fulton's steamboat, "Clermont," no governmental regulations were deemed necessary for ships and passengers, except only that the ordinary rules of navigation had to be observed. As steam superseded the "wind-jammers" and ships were propelled at terrific speed by monster engines, complicated in construction, demanding the greatest skill and most careful training for successful operation, the Federal government enacted statutes regulating this subject.

To carry out this purpose Congress passed laws which provide for "the better security of life" and the comfort of passengers traveling upon vessels, whether on the rivers, lakes or oceans; for the thorough inspection of a ship's hull and equipment, and for a careful investigation of the safety and fitness of her "boilers and appurtenances." Besides, the responsibility for navigating modern ships being much greater, because of size and speed, a careful examination into the physical condition and mental qualifications of masters, pilots, engineers and other officers is required by law.

With these objects in view Congress established a "Steamboat Inspection Service" under the supervision of the Department of Commerce.[1] Pursuant to these laws the President appoints a Supervising Inspector General "with the advice and consent of

(1) Act of Congress, March 4, 1913, and amendments.

the Senate and who shall be selected with reference to his fitness and ability." He, under the direction of the Secretary of Commerce, superintends the administration of the steamboat inspection laws. The President also appoints eleven "supervising inspectors. Each of them shall be selected for his knowledge, skill and practical experience in the use of steam for navigation, and shall be a competent judge of the character and qualities of steam vessels, and of all parts of the machinery employed in steaming."

It may be noted that Congress intended that only highly competent men should be appointed to the service, and as a rule, the law has been observed. On the third Wednesday in January, and whenever the Secretary of Commerce may require, the supervising inspector general and the supervising inspectors meet at Washington City "for joint consultation and to assign to each of the supervising inspectors the limits of territory within which he shall perform his duties."

It therefore follows that there are eleven districts, over each of which a supervising inspector has jurisdiction. His authority is quite extensive, for he is charged with the proper enforcement of the law and all rules and regulations pertaining to navigation, and "shall watch over all parts of the territory assigned to him, shall assist, confer with, and examine into the doings of the local boards of inspectors, and shall instruct them in the proper performance of their duties," and various other obligations which the law imposes upon him and requires him to perform.

The general districts are divided into local districts, of which there are forty-eight, including Alaska, Hawaii and Porto Rico. Each local district is provided with local inspectors—an inspector of hulls and an inspector of boilers; provided, that in districts or ports where there are two hundred and twenty-five steamers or more to be inspected annually the Secretary of Commerce may appoint assistant local inspectors. Under the statute,[2] if the supervising inspector finds "that any master, mate, engineer, pilot or owner of any steam vessel fails to perform his duties according to the laws regulating steam vessels he shall report the facts in writing to the board of local inspectors in the district where the vessel was inspected or belongs; and, if need be, shall cause the offending party to be prosecuted." That is, the complaint would be made by the supervising inspector, and the local board, who are subject to the orders of their superior—the supervising inspector—would have to determine whether the complaint was well founded and sustained by the evidence. If the local board should sustain the charges then there remains the technical right of appeal to the supervising inspector—the very person who instituted the prosecution.

In the first place, the fact that the supervising inspector made the complaint would have almost decisive weight with the subordinate local board that the charges were properly preferred; secondly, to obtain relief by appeal the aggrieved party must submit to the prejudiced judgment of the informer himself. As there is no appeal allowed in most cases from the supervising inspector's decision, the accused is practically denied all relief from any complaint brought before the local inspectors by the supervising inspector.

However, this is not all, for as the law now stands, if any master, pilot, mate or engineer should violate any of the numerous statutory provisions, rules and regulations, he may be prosecuted for such violation before the local board of inspectors. The accusation is made by either local inspectors filing charges with themselves specifying the statute, pilot rule or regulation that may have been violated; and they decide upon the sufficiency of their own complaint and in some cases finally. Under the statute[3] if the local inspectors refuse to grant, or revoke, or suspend the license of

(2) U. S. Rev. St., Sect. 4407.
(3) U. S. R. S., Sect. 4452.

a master, pilot, mate or engineer, the action of the local board may be reviewed by the supervising inspector *de novo*. He may summon witnesses and compel their attendance and administer oaths and proceed to trial as a regular court. In extreme cases an appeal may be prosecuted from the supervising inspector to the inspector general, who may likewise grant a hearing *de novo* —examine witnesses and determine the case as a court of original jurisdiction.

A casual reading of the statutes pertaining to the steamboat inspection service,[4] and the various amendments thereof and the numerous rules and regulations by the Secretary of Commerce and boards, will readily convince anyone that if the local board—that is, the inspector of hulls and the inspector of boilers—carefully and conscientiously perform their lawful duties, they are rendering important public service; that they are charged with great responsibility and have a large amount of detail work to consider, requiring special skill, extensive experience and above all, sound, practical knowledge of ships and navigation.

This article is not written for the purpose of criticizing or reflecting upon the work of any local board or supervising inspector. On the contrary, the fact is that the officers composing the local boards and supervising inspectors are performing valuable services, and, generally speaking, do remarkably well; for it is not so much the official, as it is the system that is at fault. The criticism is that the officers of the inspection service should not be required to perform duties for which they have no qualifications, nor training, nor time; that they should not be legally compelled to act in a triple capacity in order to enforce and to punish any violation of the laws, rules and regulations coming under their official cognizance, and for that purpose become accuser, witness and judge and occasionally prosecutor as well.

(4) U. S. R. S., Sect. 4399 to 4500.

That these remarks concerning the steamboat inspection service are well founded may be demonstrated from court records. It appears that a skipper, George R. Williams, desired a pilot's license. He applied for examination to the local board at Oswego, N. Y., and was refused because he did not show that he had "three years' experience in the deck department of vessels, as required by rule 46 of the board of supervising inspectors." He then applied to the U. S. District Court for an order on the board to grant him an examination. This order was denied and affirmed on appeal, because the district court at that time had no jurisdiction.[5] Next, he filed a bill in equity in the U. S. Circuit Court upon the same facts and it was dismissed, holding Rule 46 valid.[6] Defeated but undaunted, Williams appealed and the Circuit Court of Appeals reversed the Circuit Court, in that Rule 46 requiring three years' experience in the deck department was void, directing that the local board grant him an examination for pilot.[7] Accordingly, Williams was granted an examination for pilot but failed to pass. Whereupon he brought a suit in equity in the U. S. District Court alleging malice and arbitrary action by the local board. The court held that the "decision of the inspectors as to an applicant's qualifications is final and not reviewable by the court unless it appears that they acted arbitrarily or with malice in denying a license."[8]

A third time an appeal was prosecuted. In passing on the rights of an applicant for a pilot's license the appellate court declared —that "the courts have no authority to review the findings of the steamboat inspectors by appeal or writ of eror. The most they can do is to see that the Constitution and statutory rights are not impaired."[9]

The remarkable thing about this litigation is that Williams prosecuted these cases *in*

(5) Williams v. Wolther, 180 Fed. 709.
(6) Williams v. Wolther, 189 Fed. 700.
(7) Williams v. Wolther, 198 Fed. 460.
(8) Williams v. Wolther, 210 Fed. 318.
(9) Williams v. Wolther, 223 Fed. 423.

propria persona, not being an attorney. The courts were very considerate of his rights, no doubt believing that he had not been treated fairly, or else disapproved of the system; for they allowed him to file pleadings and briefs which did not comply with the court rules and also in all cases, except the last appeal, relieved him from costs.

Since then other litigation has shown that there should be either a radical revision of the system, or that there should be a special tribunal created to have jurisdiction over all matters requiring judicial cognizance under the steamboat inspection service. Joyce was a mate on an ocean steamer. He was notified that his license was revoked without any hearing. On application to the Federal Court it was held that "the act of the local inspectors to revoke such license without notice or hearing is arbitrary and not authorized by law." This was attempted under the arbitrary direction of the supervising inspector who was legally charged with the duty of protecting the rights of anyone who might appeal to him.[10]

Fredenberg was a pilot on the steamer "Bremerton." He was accused of having violated Pilot Rule 25, which requires a steam vessel to "keep to that side of the fairway or midchannel which lies to the starboard side of such vessel." Upon a hearing before the local board he was found guilty, fined $50.00, and his license suspended for six months, and this sentence was affirmed on appeal, although the law plainly provided for a penalty of $50.00 only. It appears from the record in the Federal court that during this suspension Fredenberg continued to act as pilot on the same steamer and made one hundred and thirty short trips. The statute imposes a penalty of $100.00 upon a vessel navigated without a licensed pilot and a like sum against the pilot. As Fredenberg's license was in suspense it was claimed that the steamer was liable for one hundred and thirty fines or $13,000.00, and Fredenberg for a like sum. When the authorities threatened to libel the vessel proceedings were instituted in the U. S. District Court to enjoin the enforcement of this large fine and to have the inspectors' acts annulled. The result was a decision that "the license was suspended arbitrarily, without notice, and the assessment of the $26,000.00 penalty is therefore not warranted." Although a large amount was involved the court's ruling was so manifestly correct that no appeal was taken.[11]

In another case the inspectors imposed a penalty of $50.00 and arbitrarily, in addition thereto, suspended a master's license for six months without authority of law. On appeal the supervising inspector would not entertain nor decide the appeal unless the master would first submit to the unlawful suspension of his license. In this case[12] it was held that the act of the inspectors in suspending the master's license was wholly void. According to this decision—"The inspector having exceeded the power conferred by law, acted without jurisdiction in suspending the license and, therefore, the suspension has no operative effect." The record shows that the master suffered wrongful suspension for months before relief was granted him in court.

The situation with reference to the steamboat inspection service is simply this: so far as the boards are required to inspect vessels and equipment and pass upon the competency and efficiency of the various officers, they are undoubtedly well qualified and as a rule perform excellent service, but when they act in a judicial capacity they are, generally speaking, unfit for such duties. The authority to adjudicate the various charges for the violation of navigation laws and numerous rules and regulations involving heavy penalties and forfeitures, and appeals concerning the granting, refus-

(10) Joyce v. Bulger, 240 Fed. 817.

(11) Fredenberg v. Whitney, 240 Fed. 819.

(12) Benson v. Bulger, as Supervising Inspector, decided by Judge Neterer in the U. S. District Court at Seattle, April 26, 1918, not reported.

ing or revoking of licenses should be vested in some proper tribunal. The U. S. District Courts may be entrusted with these powers. It is evident, however, that a special court affording almost immediate relief is necessary, for prompt action is of the utmost importance. Questions of fact would have to be determined, requiring technical knowledge and experience. Perhaps some plan, like the one adopted by the English admiralty, would best serve the purpose: "the judge is assisted by two Masters of Trinity—retired sea captains." They would be impartial and experienced in practical navigation, while the judge would guide them as to the law and determine the penalty.

The reason offered against a special court is that inspectors now have arbitrary power while acting within the law to discipline lax, negligent or offending officers, and that drastic action, although illegal, is best for the steamboat service. On the other hand, how can an inspector be defended or justified who deliberately suspends the license of a master or pilot and deprives him of his livelihood for six months, and imposes a fine of $50.00 also, when the law punishes the offense by a fine of $50.00 only?

It is certain that most of the inspectors would prefer that they be relieved of all judicial work; that they be required to make complaints for the infraction of laws, rules and regulations, but that some court or tribunal determine these charges and impose the penalty. The more competent the inspector may be in his special line of work the less competent he would probably be to serve in a judicial capacity. However, the fact that the complainant under the present system is also compelled to be prosecutor, witness and judge and in some cases even appellate judge, should be its own condemnation, and should be ample reason for the establishment of a "Mariner's Court" in each of the eleven districts.

The only possible redress for the arbitrary and unlawful acts of the inspectors is by application to the Federal courts for equitable relief, which is grudgingly granted, even in extreme cases, and when it is evident that the board exceeded its legal powers and that there is no adequate and speedy remedy at law—otherwise there is practically no remedy.

This practice is not consistent with the American idea of law, justice or fair play. Judge Holmes of the U. S. Supreme Court voiced the popular sentiment on this subject in a recent case,[13] thus: "It is contrary to our practice and ways of thinking for the same person to be accuser and sole judge in the case."

How this proposed court is to be organized and what its jurisdiction, practice and procedure should be are not now considered, the present purpose is to demonstrate that such a court is an actual necessity if the laws, rules and regulations of the steamboat inspection service are to be impartially, justly and lawfully administered.

FRED H. PETERSON.

Seattle, Wash.

(13) Toledo Newspaper Co. v. U. S., 38 Supreme Court Rep. 560.

USURY—COMMISSION BY AGENT.

McCARTHY v. LIBERTY NAT. BANK.

Supreme Court of Oklahoma. Aug. 13, 1918. Rehearing Denied Nov. 26, 1918.

175 Pac. 940.

Where the president of a bank, having full power to make loans for the bank, takes more than the legal rate of interest, the bank is liable for usury, although the president charges the excess over the legal rate as commission and retains it as his individual property.

POPE, C. John S. McCarthy, plaintiff in this action in the court below, desiring a loan of $6,000, went to the Tulsa State Bank and negotiated the loan through the medium of its president. The transaction assumed in outward form the guise of a loan of $8,000 for one year. This amount was placed to the credit of McCarthy in said bank, who immediately, as a

part of the agreed transaction, paid the president of the bank, from said sum, the sum of $2,000, of which $800 was to be the interest on the loan and $1,200 commission to the president of the bank for making the loan—a consideration of 25 per cent. paid by McCarthy for the use of the money.

McCarthy paid the note in full, and thereafter demanded the payment to him of $4,000; his claim being that the said sum was double the amount of the usury paid.

In the verified petition in the record, one of the allegations, which are nowhere denied under oath, is that, after the giving of the notice above mentioned, McCarthy was inveigled into the private room of the bank, which had by that time changed its name to the Liberty National Bank, was locked in said room, forced by threats of being killed to sign an instrument renouncing all claim for usury and after the delivery of said instrument was violently assaulted by one A. E. Lewis, who honors the bank by acting as its president.

Thereafter McCarthy brought this action against the Liberty National Bank to recover $4,000 usury. On the trial it was shown by uncontradicted evidence that the Tulsa State Bank had reincorporated as the Liberty National Bank; the latter bank being organized by the officers and stockholders of the former, taking over its assets, continuing its business, and beng conducted by the same officers. Judgment was rendered for the bank, and McCarthy brings error. The bank sought to avoid liability under two theories. The one was that the $2,000 consideration received for the loan of $6,000 for a year was not interest; the contention being that only $800 was interest, and the remaining $1,200 a commission charged by the president in his individual capacity and retained by him as a commission for making the loan. The other theory was that the Liberty National Bank, as distinguished from the Tulsa State Bank, was not liable by reason of the change of incorporation and name.

These contentions will be considered in their order.

(1) We cannot agree with the contention of the bank that a part of the 25 per cent. charged the plaintiff for this loan was a commission going to the president of the bank and not interest. The man Lewis, president of both of the banks, or rather the one bank under both names and both corporations, had full charge of making loans for the bank. "I loan the bank's money to who I want to," he says, and that he kept the $1,200, as his commission without the knowledge or consent of the stockholders or the directors. "Certainly, I make a commission on loans every now and then; I reserve that right."

The uncontroverted testimony shows that Lewis had and exercised the right of making loans for the bank, he was clearly a general agent for that purpose. The funds of the bank were in his possession to be loaned. His official position was such that his knowledge would be the knowledge of the corporation. The authorities amply sustain the position that compensation received for a loan under such conditions cannot be called a commission, and the pains of usury thus avoided. Bean v. Rumrill, 172 Pac. 453; 46 L. R. A. (N. S.) 1157, note; 19 L. R. A. (N. S.) 391, note.

It may be that the man Lewis was guilty of a fraud on his bank, and was secretly appropriating part of the compensation which he received for loans without the knowledge of the stockholders and directors. If so, the bank has its remedy against Lewis; but it cannot deny that his knowledge was its knowledge, or escape liability to third persons for the acts of Lewis within the scope of his authority in doing that which it had put into his power to do. If the bank suffers a loss by reason of unauthorized charge of usury by Lewis, the bank may have a remedy against Lewis; but certainly this does not purge the transaction of usury.

(2) Nor can the bank escape liability because it changed its name from Tulsa State Bank to the Liberty National Bank, and abandoned its state charter and continued business under a federal charter. The uncontradicted evidence is that it was composed of the same individuals, same officers, the same management, and continuing the same business at the same place. The law seems to be well settled that, where a corporation is the mere incarnation of a prior corporation, the new corporation must answer for all of the obligations of the old. 11 L. R. A. (N. S.) 1119, note; Montgomery-Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 L. R. A. 665; Hibernia Ins. Co. v. St. L. & N. O. Transp. Co. (C. C.), 13 Fed. 516; Camden Interstate R. R. Co. v. Lee, 84 S. W. 332, 27 Ky. Law Rep. 75.

There seems to be little or no controversy about the facts in this case. We are therefore of the opinion that the case should be reversed and remanded, with instructions to the trial court to enter judgment for the plaintiff below

for the $4,000 usury paid, $300 attorney's fee, and for costs.

PER CURIAM. Adopted in whole.

NOTE.—*Bank Liable for Usury Where President Adds Commission to Loan.*—In the instant case it was said the bank was liable whether its officer secretly or with knowledge of the bank took the commission he did or not, because the president in exacting was acting "within the scope of his authority." It, of course, is difficult to understand how, in the case at bar, there could not have been knowledge of the bank. It knew, or must be supposed to have known, that there was a loan for only $6000 and that a note was given for $8000. Even the $800 paid for interest on $6000 seems usurious, being over 13 per cent. on the amount loaned. This to the bank was notice that there was usury and makes approval of the loan usurious. The additional $1200 exacted was part and parcel of this transaction of which the bank received the benefit.

Bean v. Rummill, Okla., 172 Pac. 453, holds that where a money lender engages an agent to make loans and the agent procures a loan for borrower paying the highest statutory interest and there is added to the principal the agent's commission, the whole to bear this maximum rate, the principal has knowledge from the face of the note that usury inheres in the transaction.

In Brown v. Johnson, Utah, 134 Pac. 590, 46 L. R. A. (N. S.) 1157, the note was for $350, fifty dollars of which was paid to the agent of the lender for his commission. Under these circumstances there was held to be nothing on the face of the note to show any knowing reception of usury by the principal.

And in Griswold v. Dugane, 148 Iowa 504, 127 N. A. 664, there seemed an assumption that the fact of a charge of usury by the agent was known to the principal. This case held that any agreement by a borrower with an agent of the lender to pay a commission in addition to maximum rate of interest renders the transaction usurious, but the question was submitted to the jury whether the agent procured the money in behalf of borrower or as agent of the lender.

And in Silverman v. Katz, it was held that the mere exaction by lender's agent of a commission in addition to legal interest does not of itself fix a charge of usury on the lender. He must know about such exaction. And later this principle was affirmed by N. Y. Court of Appeals in Schwarz v. Sweitzer, 202 N. Y. 8, 94 N. E. 1090, but in this case the loan was for $800 and the principal took the note for $960, upon which the principal collected interest. This carried knowledge to the principal of the exaction of a bonus or commission, of which the principal approved the taking by accepting interest on that along with interest on what the principal actually loaned.

In Am. Mortgage Co. v. Woodward, 83 S. C. 521, 65 S. E. 739, it was held that principal was liable for usury where commission and interest added exceed the lawful rate. There the loan was for $400, from which was deducted $80, of which the broker received one-fourth and the lender three-fourths. This case, therefore, does not necessarily support the instant case.

In Clarke v. Havard, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, it was held that usury was established against the lender, if he had actual or constructive notice that included in the note were agent commissions.

It seems to me that the Oklahoma rule is in effect that as to this bank the president did something in the exaction of the usury that was in the scope of his power and that the bank was affected with notice thereof, though the face of the note does not show usury. I doubt very much that this principle is true. There was, as stated above, however, quite a conclusive reason for believing that the bank knowingly collected interest on a greater sum than it knew it had loaned. The judgment was, in this view, for the right party. And if the bank had specifically commanded its officer not to charge usury and yet knew he was not only charging usury, and in addition it was collecting interest on a larger sum than it had loaned, the courts will not disentangle a lending which the bank had made, separating the valid from the invalid interest.

C.

HUMOR OF THE LAW.

The fair young thing threw her arms around the bridegroom-to-be-in-another-twenty-four-hours.

"Oh, Walter," she gurgled, "dad's going to give us a check for a present!"

"Good," said the man. "Then we'll have the wedding at noon, instead of 2 o'clock!"

"But why, dear?"

"The banks close at 3!"

One woman juror on a California jury said to another juror of her own sex:

"I just hate that lawyer with the mustache," meaning thereby the lawyer for the defense.

Counsels for defense objected that this expression of emotion disqualified the juror and vitiated the verdict. The Supreme Court of California (171 Pac. Rep. 255), shows a wide acquaintance with feminine peculiarities of speech, where in sustaining the verdict it expressed itself as follows:

"Terms in young ladies' seminaries, and even college careers, have sometimes netted no more in the way of a vocabulary, or in power of expression than 'I just hate,' 'I just love,' 'It is perfectly grand,' 'It is perfectly lovely,' or 'perfectly terrible'—terms applied without reference to real emotion, and to things animate and inanimate, from marshmallows to men, and from breakfast foods to works of art. * * * No prejudice is reflected in the verdict."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bailment**—Employment of Bailee.—One holding himself out as a machinist and accepting employment to repair a steam engine is presumed to know the nature and the character of the work he is about to do and the results likely to follow a negligent performance of his work, and is therefore liable for the damage proximately resulting from a negligent and unskilled performance of his work.—Arkansas Machine & Boiler Works v. Moorhead, Ark., 205 S. W. 980.

2. **Bills and Notes**—Notation.—The words "Note secured by a mortgage," immediately above the body of the note, do not make the additional obligations contained in the mortgage a part of the note.—Chinn v. Penn, Cal., 175 Pac. 687.

3.——Signing as Surety.—The adding of the word "security" to the signature of one of two joint debtors on their joint note held a self-serving act and insufficient to prove an agreement for the relationship of principal and surety.—Lisle's Adm'rs v. Oliver, Ky., 205 S. W. 954.

4. **Brokers**—Contract of Purchase.—Where a broker contracts to furnish a purchaser ready, able, and willing to purchase described property on the owner's terms, he is not required to produce the purchaser's written contract of purchase, unless the contract so provides.—Moore v. Mazon Estate, Inc., N. M., 175 Pac. 714.

5. **Carriers of Goods**—Terminal Facilities.—Although, under Public Utilities Act, § 44, a railroad company is required to receive cars from another and haul them to their destination, it is not required to give the use of its terminal facilities to another railroad company, where it has received no part of the haul.—Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., Ill., 120 N. E. 626.

6. **Carriers of Live Stock**—Caretaker.—A shipper of live stock, who was given free transportation in consideration for feeding and caring for the stock, is a passenger.—Lusk v. McBride, Okla., 175 Pac. 747.

7. **Carriers of Passengers**—Intoxication.—The ejection of a passenger for nonpayment of fare, when known to be too intoxicated to protect himself from trains passing the place of ejection, is negligence.—Lee v. Atlantic Coast Line R. Co., N. C., 97 S. E. 158.

8. **Certiorari**—Review.—On error, only points made in petition for certiorari can be reviewed. Continental Aid Ass'n v. Hand, Ga., 97 S. E. 206.

9. **Commerce**—Long and Short Haul.—Const. art. 12, § 21, respecting freight charges for long and short hauls, is not unconstitutional, as being in conflict with the commerce clause of the federal Constitution (article 1, § 8, cl. 3).—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., Cal., 175 Pac. 682.

10. **Confusion of Goods**—Oil and Gas Lease.—Where oil and gas lease was transferable only on consent of lessor, who was to receive one-half of consideration, and it was sold with other leases for a bulk consideration, the identity of property was not lost or destroyed, and doctrine of confusion of goods did not apply.—Moherman v. Anthony, Kan., 175 Pac. 676.

11. **Conspiracy** — Co-Conspirator. — Where there is a conspiracy to cheat and defraud any one of any property, all the conspirators are responsible for all done in pursuance thereof by any co-conspirators until object of conspiracy is fully accomplished.—Democrat Printing Co. v. Johnson, Okla., 175 Pac. 737.

12. **Constitutional Law** — Tax Deed. — Purchaser of a tax certificate, when Comp. Laws 1897, § 4101, was in force, making a tax deed prima facie evidence of the regularity of prior proceedings, has no vested right under such statute, and it is competent for the Legislature to repeal it.—Harris v. Fiend, N. M., 175 Pac. 722.

13. **Contracts**—Executed Agreement.—A written contract can be modified by another written contract, or by an executed oral agreement, made upon a good consideration.—Northern Wyoming Land Co. v. Butler, U. S. C. C. A., 252 Fed. 971.

14.——Implied Intent.—In construing any writing, the expression of an intent, as to the particular thing under consideration, negatives the idea of an implied intent in regard thereto; the maxim "Expressum facit cessare tacitum" applying.—Worst v. De Haven, Pa., 104 Atl. 802.

15.——Meeting of Minds.—Minds of parties not meeting on same contract; no liability results.—J. I. Case Threshing Mach. Co. v. Southwestern Veneer Co., Ark., 205 S. W. 978.

16.——Mistake of Law.—Money or property parted with through a mistake of law may be recovered.—Hartsfield v. Wray, Ky., 205 S. W. 965.

17.——Restraint of Trade.—Agreements in partial restraint of trade will be upheld, if founded on valuable consideration, reasonably

necessary to protect the interests of the parties, and not prejudicial to the public interests.—Mar-Hof Co. v. Rosenbacher, N. C., 97 S. E. 169.

18. **Corporations** — Corporate Assets. — Although stockholders own, proportionately to their holdings, the right to share in the corporate assets, the assets belong to the corporation until the corporation agents exercise their discretion and divide them among the stockholders.—United States Trust Co. of New York v. Heye, N. Y., 120 N. E. 645, 224 N. Y.

19. **Courts**—Intervention.—Where, after decree foreclosing a trust deed on the property of a railroad company, interveners who asserted that their claims were entitled to priority filed intervening petitions under Equity Rule 37, they cannot thereafter amend the petitions and attack the validity of the trust deed.—First Trust Co. v. Illinois Cent. R. Co., U. S. C. C. A., 252 Fed. 965.

20. **Customs and Usages**—Latent Ambiguity.—Where the meaning of a clause in a land contract was clear and unambiguous, and the language used capable of but one interpretation, testimony of real estate men as to the effect of such a clause according to the custom of men in real estate business was inadmissible.—Kenyon v. Millard, Del., 104 Atl. 778.

21. **Corporations** — Right of Inspection. — Where officer of corporation refuses to permit stockholder to inspect books and copy minutes and names of stockholders upon ground that stockholder's motive in so doing is improper, and stockholder brings action to compel officer to permit such inspection, the burden of proving that stockholder's motive is improper is upon officer.—Knox v. Coburn, Me., 104 Atl. 789.

22. **Criminal Law**—Former Acquittal.—A former acquittal is in the nature of an affirmative defense, and the burden of proving it is on defendant.—Barker v. State, Ind., 120 N. E. 593.

23.——Immunity of Witness.—Code, § 4612, providing that incriminating testimony given in certain prosecutions shall not be used against witness, does not create absolute immunity, and where testimony given is not used, directly or indirectly, in prosecution of witness, statute has not been breached.—Doyle v. Wilcockson, Iowa, 169 N. W. 241.

24.——Inapplicable Instructions. — Special charges, inapplicable to any issue in the case, were properly refused, although requested at the proper time.—Green v. State, Tex., 205 S. W. 988.

25.——Principal in Misdemeanor.—Any person aiding directly or indirectly in the maintenance of a disorderly house, which is a misdemeanor, is a principal, and is guilty of that offense.—Ward v. State, Ga., S. E. 198.

26.——Suspicion of Guilt.—A defendant cannot be convicted upon mere suspicion of guilt, upon even strong probabilities of guilt, but to warrant a conviction the testimony considered as a whole must be clear and convincing, wholly satisfying the minds and consciences of the jurors.—Temple v. State, Okla., 175 Pac. 733.

27. **Death**—Dependency.—In action for wrongful death of son, where there is evidence of parent's dependency and a reasonable expectation of contribution from son, the measure of damages is the amount compensating parent for loss sustained by son's death.—Lusk v. Phelps, Okla., 175 Pac. 756.

28.——Statutory Action.—Right to maintain an action for damages for wrongfully causing the death of a human being is purely statutory.—Drury v. Krogman, Ind., 120 N. E. 620.

29. **Deeds**—Conditions in Deed.—Where a grantee accepts a deed and takes possession of the real estate, he is bound by the conditions of the deed, since he cannot accept the beneficial provisions alone.—Ramsey v. Yount, Ind., 120 N. E. 618.

30.——Undue Influence.—Where plaintiffs in a suit to set aside a deed had made a prima facie case by showing a conveyance without consideration, and that one of the grantees possessed great influence over the grantor, who was old and feeble, the burden shifted to the grantees to show that the transaction was fair and free from fraud and undue influence.—Willoughby v. Reynolds, Ky., 205 S. W. 947.

31. **Descent and Distribution**—Moiety Defined.—The word "moiety," as used in Ky. St. § 1393, as to distribution, means one-half only of the estate, and cannot be construed to mean the whole thereof.—Young v. Smithers, Ky. 205 S. W. 949.

32. **Eminent Domain** — Inconsistent Use. — Where land held for one public use is lawfully taken for another inconsistent public use, the former use is destroyed.—Price v. Whelan, Pa., 104 Atl. 807.

33. **Equity**—Findings of Master.—In a case involving the constitutionality of a state law, statutory or municipal, the court will not be bound by the findings of a master.—Spring Valley Water Co. v. City and County of San Francisco, U. S. D. C., 252 Fed. 979.

34. **Evidence**—Expert.—A non-expert witness, testifying as to the sanity of another, may detail specific facts and occurrences, though it is not essential that he do so.—Coral Ridge Clay Products Co. v. Collins, Ky., 205 S. W. 958.

35.——Judicial Notice.—The court judicially knows that river floods frequently occur, that they are destructive of life and property, and that sometimes they are calamitous.—Watts v. Evansville, Mt. C. & N. Ry. Co., Ind., 120 N. E. 611.

36.——Specific Performance.—In an action for specific performance of a Greek marriage contract, evidence was admissible as to what the parties meant by "dowery."—Cordopatis v. Bakalopoulos, N. H., 104 Atl. 786.

37. **Executors and Administrators**—Support of Decedent.—Where decedent granted his daughter land in consideration of support, and she broke the contract, so that a son was required to support decedent, the latter's administrator could recover from the daughter the value of services and support, and enforce his recovery by means of an equitable lien upon the land.—Zoellers v. Loi, Ind., 120 N. E. 623.

38.——Surcharging and Falsifying.—Where administrator failed to exercise common care and caution in selling decedent's property, he was not liable to be surcharged for more than full value of property on day of sale, in ab-

sence of gross negligence or fraud.—In re Seidman's Estate, Pa., 104 Atl. 799.

39. **False Imprisonment**—Probable Cause.—Neither malice nor lack of probable cause is an essential element of a right of action for false imprisonment.—Johnson v. Norfolk & W. Ry. Co., W. Va., 97 S. E. 189.

40. **Frauds, Statute of**—Demurrer.—The defense of the statute of frauds can be raised by demurrer to petition only when facts alleged in petition affirmatively show that contract is oral and that there has been no such performance as to raise an exception.—Port Wentworth Lumber Co. v. McLean, Ga., 96 S. E. 194.

41. **Fraudulent Conveyances**—Bulk Sales Law.—One who purchases property without compliance with the Bulk Sales Law, and has been obliged to pay the seller's debts, may, when a judgment creditor of the seller attempts to subject the purchase-money notes to his debt, set off his damages resulting from such payment.—N. M. Uri & Co. v. McCroskey, Ark., 205 S. W. 976.

42. **Guardian and Ward**—Bond of Guardian.—In an action on a guardian's bond on the ground of the guardian's defalcations, the burden was on plaintiff to establish such defalcations.—Morgan v. American Surety Co. of New York, Kan., 175 Pac. 675.

43. **Habeas Corpus**—Custody of Child.—While the best interest of a minor child is the controlling question in awarding its care and custody, the natural right of the father, as parent, cannot be set aside on sentimental grounds, nor on theory that child would receive better care from child's mother's sister having its actual care and custody.—State v. Armstrong, Minn., 169 N. W. 249.

44. **Insurance**—Involuntary Exposure.—In action on insurance policy wherein liability for death from involuntary exposure to danger was exempted, where insured was killed by locomotive while walking on a railroad track, it was immaterial that others were accustomed to use the same track.—Arichibald v. Order of United Commercial Travelers, Me., 104 Atl. 792.

45. **Judgment**—Amendment.—A judgment will not be amended to include an agreement between the parties on the ground that it was omitted by mistake where no application to court was made to insert agreement, the court having had no opportunity to make mistake.—Mann v. Mann, N. C., 97 S. E. 175.

46.—Code Practice.—In code states courts will render such judgments as the evidence and pleadings warrant, regardless of the form of action.—Ocean Shore Development Co. v. Hammond, Cal., 175 Pac. 706.

47.——Full Faith and Credit.—In action on judgment rendered in another state, a defense which goes to the merits of the original action is violative of full faith and credit clause of the federal Constitution.—Kenney v. Supreme Lodge of the World, Loyal Order of Moose, Ill., 120 N. E. 631.

48.——Priority.—A decree, finding that certain claims against a railroad company were entitled to priority over a mortgage, is not a conclusive adjudication that other and possibly similar claims were entitled to priority, but that question is open for adjudication.—First Trust Co. v. Ogden Consol. Coal Co., U. S. C. C. A., 252 Fed. 970.

49.——Res Judicata.—An estoppel by judgment is not confined to the judgment, but extends to all facts involved in it as necessary steps or as groundwork upon which it must have been founded.—Uncle Sam Oil Co. v. Richards, Okla., 175 Pac. 749.

50. **Landlord and Tenant**—Forfeiture.—Where a lease contains no express provision for forfeiture, and there has been a partial performance, it will not be declared forfeited.—Smith v. Glover, Ark., 205 S. W. 891.

51. **Larceny**—Indictment and Information.—Indictment for theft of a bale of cotton, giving its value, need not allege its weight.—Bell v. State, Tex., 205 S. W. 986.

52. **Libel and Slander**—Privileged Communication.—A communication is privileged, if made bona fide by one having an interest in the subject-matter to another also having an interest in it, or standing in such a relation that it is a reasonable duty, or is proper, for the writer to give the information.—Wise v. Brotherhood of Locomotive Firemen and Enginemen, U. S. C. C. A., 252 Fed. 961.

53.——Privileged Communication.—In an action on the case for libel, where the charges are conditionally privileged communications, the burden of proving malice by affirmative evidence rests on plaintiff.—Sweeney v. Higgins, Me., 104 Atl. 791.

54. **Licenses**—Revocation.—A parol license to use the lands of another is revocable at the pleasure of the licensor, unless given for a valuable consideration, or unless money has been expended on the faith that it was to be perpetual or continuous.—Chamberlin v. Myers, Ind., 120 N. E. 600.

55. **Malicious Prosecution**—Advice of Counsel.—Where prosecutor, before instituting criminal proceedings, obtains advice of counsel upon all the known facts bearing on case, or which could have been known by reasonable inquiry, and acts honestly on such advice, the want of probable cause is negatived.—Goad v. Brown, Okla., 175 Pac. 767.

56. **Marriage**—Presumption of Validity.—Where a marriage has been celebrated in accordance with the form of the law, the law indulges a strong presumption in favor of its validity.—Copeland v. Copeland, Okla., 175 Pac. 764.

57. **Master and Servant**—Dependent.—A deserted wife, who has subsequent to her desertion been guilty of adultery, is not a "dependent" of her husband, within Rev. St. c. 50, § 1, subd. 8(a); "desertion" under the act having its usual meaning in connection with marital relations.—Scott's Case, Me., 104 Atl. 794.

58.——Evidence.—In a hearing under the Workmen's Compensation Act, § 45, to review an award, because of change of conditions, the parties are bound by the proof made at the former trial, and proof is limited to evidence to prove or disprove the contention that the conditions existing at the time of the award have changed.—Pedlow v. Swartz Electric Co., Ind., 120 N. E. 603.

59.——Proximate Cause.—Where mine laborer was injured by reason of dense smoke, rendering it impossible for miner's lamp to be seen beyond 8 feet, which smoke remained only because company failed to ventilate as required by Ky. St. § 2729, failure to comply with statute was proximate cause of injury.—Hazard Coal Co. v. Elam, Ky., 205 S. W. 945.

60.——Shifting of Burden.—A master using dynamite in its business must exercise such reasonable supervision over its use as would result in observance of utmost care on part of its employes, for safety of other servants, which duty cannot be shifted to its servants.—Lusk v. Phelps, Okla., 175 Pac. 756.

61.——Workmen's Compensation Act.—The general purpose of the Workmen's Compensation Act is to transfer the burdens resulting from industrial accidents from the individual to the industry, to be finally distributed upon society as a whole by compelling the industry through the employer to contribute to the support of those who are lawfully dependent upon deceased for sustenance during his lifetime.—Scott's Case, Me., 104 Atl. 794.

62.——Workmen's Compensation Act.—Where the Workmen's Compensation Board finds facts additional to those stated by the referee, and their correctness is conceded, the Supreme Court may determine the issues upon the facts so found.—Gurski v. Susquehanna Coal Co., Pa., 104 Atl. 801.

63. **Mines and Minerals**—Reservation in Deed.—Under deed granting right to mine and remove all coal, reserving to grantor right to take coal for own fuel, such reservation is subject to grantee's superior right to mine all the coal, and grantor's right terminates with exhaustion of coal granted.—Godfrey v. Weyanoke Coal & Coke Co., W. Va., 97 S. E. 186.

64. **Municipal Corporations**—Rescission of Contract.—Where the assignment of a street work contract provided that the assignor might take over the work on notice by the board of trustees that the assignee did not prosecute the work to its satisfaction, such notice did not rescind the contract of assignment; the notice not being broader than the contract expressly provided for.—Hoare v. Glann, Cal., 175 Pac. 701.

65.——Superior Right.—Neither pedestrian nor driver of automobile has rights in street superior to those of other, but each is bound to act with reasonable regard to other's presence.—Emery v. Miller, Mass 120 N. E. 655.

66. **Negligence**—Shifting Burden.—If fire was caused by defendant's engine emitting sparks or coal, which fell upon plaintiff's land and caused the fire, the burden would be shifted to defendant to show that the fire was not due to any defective condition of its engine, or to any negligence in its management or operation.—Perry v. Branning Mfg. Co., N. C., 97 S. E. 162.

67. **Nuisance** — Automobile. — Automobiles being of general use, and public gasoline supply stations being essential, their erection in a residence district is not a nuisance per se.—Hanes v. Carolina Cadillac Co., N. C., 97 S. E. 162.

68. **Partition**—Premature Judgment.—Where partition of property was asked by all the joint owners, a judgment directing a sale of the property, entered before report was made by the master, to whom the rights of the parties had been referred for determination, was not premature.—Hosch v. Hosch's Ex'rs, Ky., 205 S. W. 963.

69. **Pledges**—Care of Collateral.—A creditor accepting collateral security, and who is negligent in respect to its protection, whereby a loss is suffered, must bear such loss.—City Bank of York v. Rieker, Pa., 104 Atl. 804.

70. **Principal and Agent**—Oral Instructions.—A general power of attorney to sell land, with no restrictions as to price or terms, may be limited by oral instructions binding on the agent and any person who with knowledge thereof purchases through the agent.—Ziebarth v. Donaldson, Minn., 169 N. W. 253.

71. **Railroads**—Lookout by Servant.—Where it was the general custom for all persons to walk on private interurban right of way, it was the motorman's duty to be on the lookout for pedestrians.—Marshall v. Kansas City Rys. Co., Mo., 205 S. W. 971.

72. **Sales**—Acceptance.—Where seller's offer of cotton yarns 20's was complete and understood by both parties, and the buyer wired, "Accept offer. Make it twenty-five thousand if can make sixteens and eighteens," the acceptance was complete, and not qualified by the inquiry about different goods, although the telegram was not punctuated when received.—Wilkins v. Vass Cotton Mills, N. C., 97 S. E. 151.

73. **Statutes**—Construction.—In construing a statute according to intent, the court must make such application of its provisions as will best promote its objects, and a thing within the intention is within the statute, though not within the letter, while a thing within the letter, but without the intention, is not within the statute.—Ramsey v. Yount, Ind., 120 N. E. 618.

74. **Street Railroads**—Franchise Condition.—Where street railway, in consideration of license to construct its road on street, has agreed with city, in its franchise ordinance, to keep same in repair, persons sustaining injury through its failure may maintain suit directly against the company to avoid circuity of action.—Fowler v. Chicago Rys. Co., Ill., 120 N. E. 635.

75.——Traveling Public.—A street railroad has only an equal right with the traveling public to the use of the street in which its track is laid.—Columbus R. Co. v. Holcombe, Ga., 97 S. E. 194.

76. **Taxation**—Situs of Property.—While, as a general rule, the domicile of the owner determines the situs of personalty of which he is possessed, such is not the rule where the property is held by others as trustees.—Lowry v. Los Angeles County, Cal., 175 Pac. 702.

77. **Trusts**—Corpus.—Shares of stock of corporations, owned by one of the holding company's subsidiary corporations and acquired out of capital, upon distribution to trustee, was part of corpus of estate.—United States Trust Co. of New York v. Heye, N. Y., 120 N. E. 645.

78.——Resulting Trust.—Where legatee promises testator to use the property given him by the will for a particular purpose, a trust arises.—Seaver v. Ransom, N. Y., 120 N. E. 639, 224 N. Y. 233.

79. **Vendor and Purchaser.**—Sale in Gross.—Where a sale of land is made in gross, a recovery will not be allowed for a deficiency which is less than 10 per cent of the acreage called for by the deed; but this rule does not apply where the sale is by the acre.—Hartsfield v. Wray, Ky., 205 S. W. 965.

80. **Waters and Water Courses**—Water Channel.—Where a stream has a well-defined low-water channel, and also an expanse of lowland extending from highland to highland on either side, over which lowland the stream spreads and flows at times of freshet and flood, such lowlands, although untouched by the stream during a greater part of the year, constitute an essential part of the water channel, and must be regarded as a part of a "water course."—Watts v. Evansville, Mt. C. & N. Ry. Co., Ind., 120 N. E. 611.

81. **Wills**—Codicil.—A codicil to a will bequeathing corporate stock in trust, and providing that stock dividends or increased capital stock should be added to the trust fund, while valid as to the capital, is inoperative as to accumulated income, under Personal Property Law, § 16.—In re Megrue, N. Y., 120 N. E. 651.

82.——Testamentary Capacity.—Mental ability to transact ordinary business is not the proper test to determine whether a testatrix is possessed of testamentary capacity.—McLean v. Barnes, Ill., 120 N. E. 628.

83. **Witnesses**—Cross-Examination.—A witness to good character may be cross-examined as to whether he has heard rumors of specific charges of commission of acts, inconsistent with such good character, in order to test his credibility and the weight of his evidence, though such rumors are inadmissible unless confined to time previous to crime charged.—Pope v. State, Okla., 175 Pac. 727.

84.——Illustrating Testimony.—A map of the premises may be used by witness to explain his testimony so that the jury may understand it.—State v. Spencer, N. C., 97 S. E. 155.

85.——Pardon.—Where a witness is objected to as a convict, to entitle him to testify, he must produce his pardon.—Thompson v. State, Tex., 205 S. W. 988.